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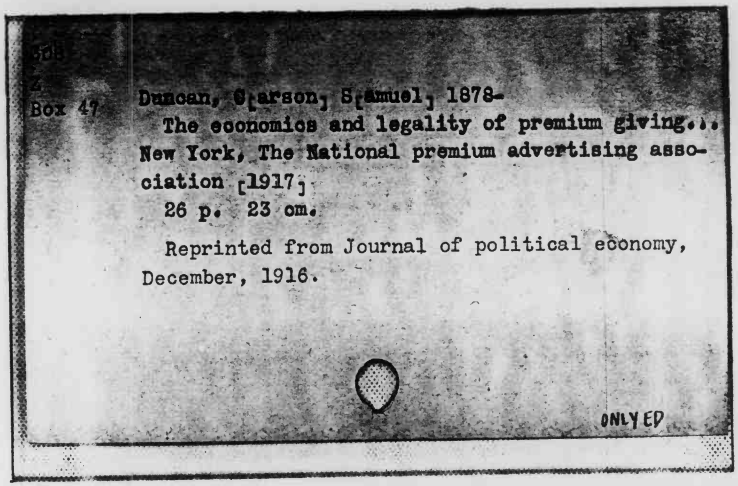
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The Economics *and* Legality *of* Premium Giving

by

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Introductory

PROFESSOR C. S. DUNCAN is the lecturer in Commercial Organization of the University of Chicago and is connected with the School of Commerce and Administration.

In the December issue of the *Journal of Political Economy*, published by the University of Chicago in co-operation with the Western Economical Society, the leading article was by Professor Duncan, and was entitled "The Economics and Legality of Premium Giving."

The National Premium Advertising Association wrote to Professor Duncan asking his permission to reprint the article in booklet form, and this permission has been given by Professor Duncan in a letter under date of January 15th.

In giving his permission he said in part:

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It will be seen that this article by this leading Economist is of particular value inasmuch as it came unsolicited, and is an honest expression of his own deductions concerning premium usage.

The Economics and Legality of Premium Giving

ON March 6, 1916, the Supreme Court of the United States handed down, simultaneously, three decisions as to the validity of state laws imposing a special license tax upon the use of trading stamps, coupons, certificates, or "other similar devices."[1] These decisions suddenly reversed the majority opinion of the lower courts which had held such laws invalid since the leading case of *People* v. *Gillson*[2] in 1888. They are of peculiar significance, therefore, because they bring this sweeping reversal, and because their effect, if they are consistently followed, will be far-reaching. It is proposed here to analyze the premium-giving system, to assemble the arguments offered for and against it, to trace the legal reasoning up to these final decisions, and to show some of the possible consequences that may be expected to follow.

I

The system of premium-giving in retail trade is a very familiar commercial phenomenon to-day, and is no new thing in business. In one form or another it runs back to unrecorded times.[3] The coupon system itself is so old that no one knows when it originated. Our ancestry were familiar with the "baker's dozen."[4] But the systems that have aroused opposition are of recent growth and are probably not more than twenty-five or thirty years old. The Sperry & Hutchinson Company, that to-day towers above all others, was organized about nineteen years ago.

These modern systems are the result of business specialization. Formerly the merchant or manufacturer himself gave to the customer a "bonus for patronage," whether it was a stick of candy to the children, a cigar to the man, a ribbon to the woman, "knocking off the odd cents" for an "even count," a souvenir spoon in the package, the choice of a group of selected articles on the counter, or some other one of a countless number of devices. But the time came when the merchant found it inconvenient to keep the premiums in stock, to look after the printing of the coupons, trading stamps, or other tokens.[5] Then arose the specialist, like Thomas A. Sperry, who

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[1] *Rast* v. *Van Deman & Lewis*, 240 U.S. 342; *Tanner* v. *Little*, 240 U.S. 369; *Pitney* v. *Washington*, 240 U.S. 387.

[2] 109 N.Y. 389.

[3] H. S. Bunting, *The Premium System of Forcing Sales*, p. 1.

[4] *Current Opinion*, LVIII, 439.

[5] *Journal of Commerce*, October 15, 1915, p. 10.

organized a company to take the bother off the hands of the merchant and manufacturer, to make it his business to keep the premiums offered in stock at convenient places, to print and put into the hands of the merchant or manufacturer the "tokens," and to publish and distribute among consumers the premium catalogues.

From this specialization of function arose three general methods of issuing and redeeming coupons, etc.: (1) the merchant may issue his own coupons and redeem them; (2) the coupons may be handed out by the merchant, but issued by a company wholly separated, probably in a different state, and redeemed by a premium store near by; (3) the coupons may be issued and redeemed at some point removed from the merchant who handed them out.[1] There is no difference in function between these various methods. "All of the schemes have a common character—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase, something of value given other than it; and even as to the second and third schemes, the transactions are only executed through the purchase at retail."[2]

While this common characteristic is obvious, there are two distinctions that must be kept in mind: (*a*) when the issuance and redemption of the coupons or other tokens are taken out of the hands of the merchant or manufacturer, a new functional middleman arises to "intervene between the buyer and seller," and to demand a reward for his services; (*b*) there is a marked difference between a token given by the retailer himself, as illustrated by the S. & H. Green Trading Stamp, and the token which is packed in his goods by the manufacturer, as illustrated by the Hamilton Coupon. Both the merchant's trading stamp and the manufacturer's coupon may be alike profit-sharing, but in one case the retailer shares his profits and in the other case the manufacturer shares his. The economic significance of this distinction will appear later.

Since the inception of this idea of a functional middleman to take care of the issuance and redemption of premium tokens, many trading-stamp and coupon companies have come into existence. The premium business has grown to great proportions. It has been estimated that 125,000,000 to 135,000,000 dollars' worth of premium goods were distributed during 1915.[3] "Last year," said Mr. George J. Whelan, president of United Cigar Stores Company, "under this plan, we distributed in merchandise standard articles which cost us over $1,750,000. The

[1] Cf. *Rast* v. *Van Deman*, 240 U.S. 359-60.

[2] *Ibid.*, p. 360.

[3] Estimate by H. T. Graham, vice-president of the United Profit-Sharing Corporation; cf. also S. H. Kirkman, *Printer's Ink*, February 11, 1915, p. 28.

retail value was over $3,500,000.[1] To-day, we have about 1,000 articles for men, women, and children listed in the profit-sharing catalogue, of which we distribute 6,000,000 annually."[2] "After fifteen years," said President George B. Caldwell, of Sperry & Hutchinson, "from 1900 to the present, the Sperry & Hutchinson Company issued 21,691,757,424 tokens or stamps, and redeemed 18,089,451,158, or 84 per cent.; . . . . the remaining 16 per cent. exist as a continuing liability."[3] The same company claims to have to-day some 10,000,000 collectors of its coupons and trading stamps.[4] In 1914 the California Fruit Growers' Association redeemed over 40,000,000 of the tissue paper wrappers from "Sunkist" oranges and lemons. The Quaker Oats Company has, through extensive advertising, disposed of carloads of aluminum steam cookers, in exchange for a given number of trade-marks cut from packages of its goods, and "one dollar extra."[5] It distributed 36,000,000 coupons in 1914-15.[6]

If the general estimate given above is correct, there is distributed annually premium merchandise with a retail value of $1.25 to $1.33 per capita for every man, woman, and child in the United States. To these vast proportions has the premium business grown in a quarter of a century and in the face of persistent and increasingly bitter opposition.

There are two fairly distinct types of policies held by the coupon companies to-day, with the remnants of a third. First, the token may be given with a single condition that a certain number shall be presented collectively to obtain the premium; secondly, there may be required a specified sum of money in addition to the tokens, and there are still instances where the premium accompanies the purchase, usually inclosed in the package. This last-named type lies clearly within the lottery field, owing to the element of uncertainty.[7] It may be dismissed as a plan long since discredited.

As to the first and second types, the distinction is more superficial than fundamental, for the very same appeal underlies them both. The terms of the one requiring the addition of cash are less liberal and more conservative than the other; but there are few policies that will not give the premium where cash is offered to make up for a deficiency in the number of tokens. In general, the terms offered to the consumer are that certain tokens, coupons, trading stamps, tickets, certificates, wrappers, trade-marks cut from the package, etc., are to be secured as the

[1] *Printer's Ink*, June 24, 1915, p. 80.

[2] *Ibid.*

[3] *Ibid.*, p. 151.

[4] *Journal of Commerce*, April 10, 1915, p. 5.

[5] *Current Opinion*, LVIII, 440.

[6] *Printer's Ink*, April 29, 1915, p. 12.

[7] *State* v. *Hawkins*, 95 Md. 147.

result of an actual cash purchase. When these tokens have accumulated, they can be presented in specified numbers at specified "premium parlors," according to the announcement contained in the premium catalogues that are distributed free of charge to all patrons, for which certain designated articles can be obtained. The special stamps or coupons are often to be pasted in a book, which also is furnished without charge. The books usually hold 990 stamps or coupons, and premiums are offered in units of the stamp books. But there are a great many varieties of plans, each striving for an attractive uniqueness, as in the case of insurance policies.

The terms offered the dealer are also pretty much alike. The premium companies sell the tokens outright to the merchant or manufacturer in multiples of 1,000. In return for the price paid, the premium companies agree to redeem all the tokens presented at their "parlors" in accordance with the announcement in the premium catalogues which they publish and distribute at their own expense. These catalogues also contain in the "merchant directory" the names and addresses of all dealers who carry the stamps or coupons issued by the premium companies. The tokens reach the consumer always through the hands of the dealer, whether the merchant hands them out upon request, or thrusts them into the purchaser's hand—as is the policy of the United Cigar Stores—or the manufacturer incloses them in his branded package.

The rates at which the tokens are sold doubtless vary much with circumstances. In one case the dealers pay $5.00 per thousand.[1] The more usual rate is $2.50 per thousand, or $3.50 per thousand "west of the Rockies."[2] If the tokens are given out to the consumer on the basis of one with each ten-cent purchase, and are redeemed in books of 1,000 (actually 960-990), each token would presumably have the purchasing power of one-quarter of a cent. On this basis the tokens would represent a discount of 4 per cent. on each purchase.

In practice the discounts apparently range above and below this estimate. "Most soap companies figure on giving one-third of a cent actual cost per wrapper. This is about 10 per cent. of what the house receives for the soap."[3] "On a cash discount basis, the discount we give would amount to only 4 per cent. or one cent on each twenty-five cent purchase. By investing this cash in merchandise on a large scale, we give each certificate the buying power of two cents; so that we have an actual discount under our plan of 8 per cent."[4] Milk concerns have

[1] *Lansburgh* v. *District of Columbia*, 11 App. Cases 531.

[2] *The Annalist*, May 10, 1915, p. 470.

[3] S. W. Eckman, manager of the Premium Department, B. T. Babbitt, Inc., quoted by H. S. Bunting, *The Premium System of Forcing Sales*, p. 81.

[4] George J. Whelan, *Printer's Ink*, June 24, 1915, p. 80.

estimated their premium discount at an average of 4 to 5 per cent.; tobacco concerns at 2 per cent. and over.[1] "Successful premium users find that the system costs them from 2 to 3 per cent. of the volume of sales."[2]

There are no well-defined restrictions as to the kinds of goods that are fitted for use as premiums. A visit to any large "premium parlor" will reveal a bewildering assortment of merchandise. "In Syracuse we began with a total of 15 articles. To-day, we have about 1,000 articles for men, women, and children."[3] Other stocks run as high as 5,000 different kinds. The basis of selection, of course, is to appeal to patrons. Of these, even with tobacco coupons, 85 per cent. are women.[4] The broad limits seem to be that the premiums should not be too insignificant to be attractive, nor so expensive as to be discouraging. The number of tokens required has been found to range from 5 to 2,430,960 (an electric four-passenger car offered for Federal Dividend Coupons). In general the stock may be described as consisting of articles for "personal use and house furnishing."[5]

The merchandise that will carry the stamps or coupons is naturally that which sells rapidly and in large quantities. The fundamental idea is to get the patron to return—to secure continuous patronage. There is sound sense in the remark, if sufficiently qualified, that "it is immaterial to the retail trader what you consume, provided you buy it of him, and it is the dealer's effort to fix the place of purchase, rather than the kind of goods consumed."[6] And a successful merchant has said, with conviction, that "premiums can be used with profit by any manufacturer or distributor whose goods are used up with sufficient rapidity to make a quick and recurrent demand from the consumer."[7]

This, then, is the system of premium-giving in the retail trade, the system by means of which "something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase, something of value given other than it."[8] It has been shown that with the development of the system there arose a new type of functional middleman who has undertaken the task of carrying out the details of it. He has introduced the co-operative idea into the system, whereby several merchants or manufacturers can pool their inter-

[1] H. S. Bunting, *The Premium System of Forcing Sales*, p. 81.

[2] *Ibid.*, p. 21.

[3] George J. Whelan, United Cigar Stores Company, *Printer's Ink*, June 29, 1915, p. 81.

[4] *Printer's Ink*, June 29, 1915, p. 80.

[5] *Journal of Commerce*, October 15, 1915, p. 10.

[6] *Journal of Political Economy*, XIII, 581.

[7] H. S. Bunting, *The Premium System of Forcing Sales*, p. 90.

[8] *Rast* v. *Van Deman*, 240 U.S. 360.

ests and buy at a fixed rate the service of this middleman. If the manufacturer or merchant still controls his system of premium-giving, there has arisen a functional department to perform the same service. This is true of The United Cigar Stores Company, of Kirkman & Co., of James S. Kirk & Co., of the Commonwealth Edison Company, and of certain large department stores. It has also been shown that there is a marked distinction between a token inclosed in a package by the manufacturer and the token given by the retail merchant to the purchaser. In the one case, of course, the power of the appeal is in the hands of the manufacturer even while the retailer handles the goods. In the other case the retailer is master of the system. The methods and price policies connected with the system have also been described. And, lastly, attention was centered upon the character of the merchandise to which the tokens give a claim. It is now proposed to examine the arguments offered for and against the system.

II

As was stated above, the business done through the premium-giving system has grown apace, and premium companies have multiplied rapidly in the face of persistent and increasingly bitter opposition. The chief opponents have been such organizations as the National Retail Dry Goods Association, the New York Retail Dry Goods Association, the American Newspaper Publishers' Association, and the large department stores like Marshall Field & Co., John Wanamaker Company, and R. H. Macy & Co. Certain trade journals, such as the *Southern Merchant* and the *Dry Goods Economist*, are rabidly opposed and the *Saturday Evening Post* refuses to sell advertising space to the premium companies. Many individual writers, journalists, economic theorists, and others have decried it. Their arguments have been varied, if not always convincing, and may be summarized as follows:

1. "The coupon is an admission that the goods carrying it do not measure up to the price asked, and that something extra must be included to give money's worth" (John Wanamaker, quoted in the *Dry Goods Economist*, July 22, 1916, p. 36).

2. The premium-giving system, whatever its form, is based fundamentally upon the popular belief that the purchaser is getting something for nothing (*Idem*, *The Annalist*, May 10, 1915, p. 470; Arno Dosch, "The Fallacy of the Trading Stamp," *Pearson's Magazine*, August, 1911, pp. 167-74, *passim*).

3. "Profit-sharing coupons packed with merchandise do not in any way add to the value of such merchandise" (Open letter, Marshall Field & Co., *Journal of Commerce*, April 10, 1915, p. 5).

4. The trading stamp, profit-sharing coupon, etc., do not create new business, but at best only switch from one brand or one merchant to another (*Literary Digest*, June 5, 1915, p. 1363).

5. The use of the premium-giving system does not lower selling cost (*ibid.*).

6. The coupon enterprise neither buys nor sells anything in the community, except at the premium headquarters (*ibid.*).

7. Premiums do not stimulate sales for the retailer or manufacturer (*ibid.*).

8. Full values should be placed on the goods themselves (*ibid.*).

9. On standard articles the expense of the premium system must be borne by the merchant himself (*ibid.*).

10. The giving of premiums encourages fanatical and wasteful buying (*ibid.*).

11. Once started, the system automatically forces the giving of an increased number of coupons, stamps, etc. (*ibid.*).

12. Stamp-seekers buy stamps rather than merchandise (*ibid.*).

13. The system compels the payment of an expense on both old and new business (*ibid.*).

14. The premium-giving system is not only not a legitimate form of advertising, but is not a form of advertising at all. "Trading stamps constitute an inducement, but they are not an advertisement. They induce purchasers to buy at a certain store, but advertise none of the articles it contains. They act as a lure, not an advertisement" (Arno Dosch, *Pearson's Magazine*, August, 1911, p. 173; cf. also *Printer's Ink*, April 29, 1915, pp. 63-68).

15. Growing out of the idea of getting something for nothing is the deception of the purchaser. "No retail store that I have any knowledge of has built up what is seemingly a permanent business on the plan of giving something for nothing. In the long run it is the public that is fooled. Someone must bear the expense of the catch-penny device, and that someone is eventually the public" (John Wanamaker, quoted in the *Dry Goods Economist*, July 22, 1916, p. 36).

16. It has been argued that the giving of premiums is nothing else than a disguised form of price cutting. "A dealer advertising fifty trading stamps with a small purchase of soap would obviously be guilty of an attempt to cut prices" (*Journal of Commerce*, October 14, 1915, p. 1).

17. The premiums that are secured by the patient collector for all his laborious efforts are an inferior grade of goods. "Practically every coupon and trading-stamp institution offers commodities that are not up to standard grades in quality" (G. E. Lichty, *Journal of Commerce*, April 29, 1915, p. 7).

18. Besides, it is argued, the system defeats its own end in that when one merchant or one manufacturer in a certain line of goods takes it up, his competitors are compelled to follow suit, and thus they are all on a common footing again with an incubus of added cost.

19. And the theorist interposes the argument that the giving of premiums, the giving of "something besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase," through "the phenomenon of a combined price for two commodities entirely different presents itself to baffle the most careful inquiry into the nature of value" (cf. I. M. Rubinow, "Premiums in Retail Trade," *Journal of Political Economy*, XIII, 506).

20. Finally, the economic theorists have more or less directly condemned the system as a great "social waste." "The same is true of other methods of popularizing your goods—prizes, premiums, gifts, pictures, what not. These delude the purchaser into the belief that he is getting something for nothing. Like mendacious advertising, they rest on the gullibility of mankind, and are effective in proportion as they are carried out on a large scale. The tobacco combination in the United States has practiced the arts of advertising and of premium-giving systematically and successfully, success being promoted by the fact that for its commodities, good-will and the brand are of special importance" (Taussig, *Principles of Economics*, II, 428; cf. also Sidgwick, *Principles of Political Economy*, p. 418; Veblen, *Theory of Business Enterprise*, chap. iii; Knoop, *American Business Enterprise*, p. 17; Rubinow, "The Economics of Premium Giving," *Journal of Political Economy*, XIII, 574).

The adherents of the system, on the other hand, have not been quiescent. Not only have the premium companies continued to push their business, as the facts given above have shown, but they have also given a Roland for an Oliver in the thrust and parry of debate. Their arguments are listed here to compare with those of the opposition.

1. The premium-giving system, as it is generally carried out, is a plan for sharing profits with the customer (G. B. Caldwell, *Journal of Commerce*, April 10, 1915, p. 5). "The true function of the profit-sharing coupon is that of surplus distribution" (George J. Whelan, *Printer's Ink*, June 24, 1915, p. 82).

2. The premiums are given as a "bonus for patronage." "The function of the profit-sharing idea is to insure continued patronage" (George J. Whelan, *Printer's Ink*, June 24, 1915, p. 82). "The value of continuous patronage and good-will of the buying public was the incentive for the use of the premium advertising" (*Journal of Commerce*, October 15, 1915,

p. 10). "The purpose of the premium is advertisement and publicity. Its aim is not only to gain, but to retain, the purchaser. It is therefore the essential feature of the premium that it be given for a series of purchases, and not for one" (Rubinow, *Journal of Political Economy*, XIII, 574). "This is not a money consideration, but a substantial appreciation of, and return for, continued patronage. You receive an occasional gift for buying regularly from merchants who issue these stamps" (quoted from a premium catalogue).

3. Since the tokens are given presumably only upon the payment of cash, the system eliminates to a great extent "that bane of the retailer—credit accounts."

4. The premium is only a discount for cash; "is the concentration and condensation of an invisible vapor called cash discount into a concrete parcel of actual property which the consumer can feel with his fingers" (H. S. Bunting, *The Premium System of Forcing Sales*, p. 40). It is paid in merchandise because there is no coin small enough to measure the possible discount on a small purchase, say of 5 or 10 cents, and because the system makes possible, through the purchase of the premiums in large quantities, a higher percentage of discount (*Printer's Ink*, June 24, 1915, p. 80; February 11, 1915, p. 32). "We are frequently asked why we do not give the discount in cash. The above figures answer the question. *In merchandise we can give twice as much*" (*Printer's Ink*, June 24, 1915, p. 80).

5. Since the token collector is required to accumulate several before he is entitled to a premium, the system, secures for the retailers "repeat" orders. "The adoption by him [the merchant] of the premium advertising system gives to his customers in retail value articles for personal use and household furnishing practically equal to the amount so expended by him and thus insures their continuous patronage" (*Journal of Commerce*, October 15, 1915, p. 10).

6. Every merchant gives premiums in some form or other. They may take the form of concerts, theater tickets, railway fares, fashion parades, picture galleries, containers to be used for other purposes, delivery service, "leaders," insurance policies with city lots, books with subscriptions, etc. (cf. W. T. Posey, president of the United Profit-Sharing Corporation, *Journal of Commerce*, April 28, 1915, p. 12).

7. No other system divides the cost of attracting attention with the consumer (*ibid.*).

8. "It is foolish to say that the use of the premium system necessitates the increase of price or the lowering of quality. The coupon does not in any way affect the quality of goods" (*ibid.*). Merchandise in stores using profit-sharing coupons may be matched price for price and quality for quality, with goods in

stores not using them. Competition would compel this (from interview with H. T. Graham, vice-president of the United Profit-Sharing Corporation).

9. The system is not based upon the principle of something for nothing. "No intelligent premium advertiser now claims that he is giving something for nothing. He knows that he is giving something for the most valuable element in modern business, viz., patronage. The manufacturer gives coupons to secure patronage of his goods; the retailer to secure patronage of his store" (W. T. Posey, *Journal of Commerce*, April 28, 1915, p. 12).

10. The premium system is merely an effective form of advertising. "Our premium system is an advertisement, and, as a matter of fact, not only is it an advertising medium, but it is the only form of advertising in which the consumer directly benefits" (Stroock, in *Current Opinion*, LIII, 440; cf. also *Printer's Ink*, April 29, 1915, pp. 63-68).

11. "Premium-giving is simply service. It may be called by a thousand other names, but when analyzed the system is simply the expression of the desire of the merchant to give something for the purpose of inducing people to frequent his store" (G. B. Caldwell, *Journal of Commerce*, May 10, 1915, p. 10).

12. "The trading stamp and the coupon represent the small unit of service. They grant to the small buyer for cash a discount which the big buyer always has received in the past" (*ibid.*).

13. "The system does increase sales. The premium system is the best and cheapest speeder-up of sales because your motive power is returned to you the very moment it leaves your hand" (Bunting, *The Premium System of Forcing Sales*, p. 17).

14. "The premium is the only advertisement which commutes publicity into sales" (*ibid.* p. 49).

15. There is no added sales cost through a use of the premium system, for "the non-premium using business concern pays for the premium which its wide-awake competitor gives away with its goods" (*ibid.*, p. 74); pays, that is, in a loss of business.

16. "The premium system encourages thrift in purchases of small means by enabling them to secure certain articles for personal use or household adornment without the expenditure of extra funds for them. In effect this amounts to a savings fund" (H. T. Graham, letter to writer).

Thus do practical men and theorists argue for and against the premium system. That there are really two sides to the question appears at once; that it is an intricate and far-reaching question is also clear; that honest men honestly differ on it needs no further demonstration, and that many are biased by their own private interests is strongly attested. But the important thing is to isolate the issues in the case. To this end an analysis of the arguments shows that they will fall into three groups: (1) the issues

of fact, (2) the issues of policy, and (3) the issues of theory. The issues of fact are to be settled by an investigation, by a cold, unprejudiced analysis of accurate data; the issues of policy are a matter for the individual judgment of each merchant or manufacturer, unless the policy runs counter to the public safety, health, morals, or general welfare; the issues of theory are within the province of definition and logic, and demand sound premises.

The arguments falling under the issues of fact (con, 2, 4, 5, 7, 9, 10, 11, 12,.13, 17; pro, 1, 3, 4, 5, 7, 8, 9, 13, 15, 16), it may be seen, consist of assertion and denial. Much testimony has been amassed on both sides; enough at least to vitiate the whole series so far as generalization is concerned. To one who stands outside and whose judgment costs him nothing in patronage or profit, it does appear clear that circumstances might so alter the case as to make the system a burden in one instance and a source of profit in another; to increase sales here, to maintain sales there, to have no appreciable effect yonder. But out of these counter-arguments one conviction does arise: the premium system must be an effective means of drawing trade, else why this complaint by those who do not want to use it that it is forced upon them? Every argument against it fits into that background. It does not seem reasonable to believe that a merchant or a manufacturer who is in business primarily for pecuniary gain would be greatly concerned about his competitors "giving something for nothing" unless it took some trade from his own door; or that he would greatly worry whether or not his competitors' premium-giving policy created new business, lowered selling cost, stimulated sales, added a sales-cost burden, made the purchasers "fanatical and wasteful buyers," increased itself automatically, centered attention on the tokens rather than the goods, created an expense on old business, and gave the consumer shoddy goods at last unless he himself felt the shock of that system through the length and breadth of his own business. On the other hand, it does not seem likely that there would long be defenders of the system besides the premium companies themselves if there were not an implicit belief that it "got the orders."

The arguments bearing upon the issues of policy (con, 1, 6, 8, 15, 18; pro, 2, 12, 12) are an appeal to business judgment. A business policy is the attitude of the merchant or manufacturer toward, and his treatment of, his patrons. What kinds of service he shall offer, what his price policies shall be, what methods he shall use to reach and attract the customers, real and prospective—these are questions of business policy, and, within the limits of the law, are left to the individual judgment. But if a policy becomes distasteful, there are two ways of preventing its use: (1) by general agreement of

those using it to discard it (cf. closing hour, half-holidays, professional ethics, etc.), or (2) by an appeal to the law. In this case both methods have been attempted; the first without success, and the second with results to be shown later.

One point, however, of special importance looms behind this part of the controversy. Attention was called above to the distinction between a so-called manufacturers' coupon (cf. Hamilton) packed in the goods, and the so-called merchant's trading stamp handed out by the merchant to the purchaser (cf. the S. & H. Green Trading Stamp). In the former case, the coupon passes directly from the manufacturer, through the hands of all dealers, to the consumer. At no point does the dealer control it or its influence. With whatever power the coupon has it binds the consumer, not to the store of any certain merchant where the product is on sale, but to those goods themselves. Thus is the manufacturer's control over the goods strengthened until they are in the hands of the ultimate consumer.

The fight between the big dealers, both wholesale and retail, and the big manufacturers with branded goods and national advertising, to control goods as they pass into the hands of consumers, has been vividly presented in the price-maintenance controversy. There is evidence of the same thing here. It is not without some such reason that Marshall Field & Co. refuse to handle coupon-bearing goods, or that R. H. Macy & Co. tear the coupons out of the packages before selling them, or that John Wanamaker and other big retailers decry coupon giving. It is not without some such reason that the Rhode Island State Retail Grocers "view manufacturers' coupons with alarm,"[1] or that the Western Association of Cigar Dealers passes resolutions in severe condemnation of the manufacturers' coupons, or that the secretary-treasurer of the National Retail Dry Goods Association, F. Colburn Pinkham, writes, "We are not fighting the trading stamp. . . . . The reason why we are not fighting the trading stamp as we do the coupon is that the trading stamp is a matter between the merchant and his customer. He keeps the stamps himself and gives them out to his patrons. He knows what he is doing; they know what they are getting. It is all right out in the open."[2]

The projecting point is that none too soon can it be brought "right out in the open" that the main question of policy at issue is not the deception of the consumer in premium-giving, not merely the welfare of a competing merchant, not the defectiveness of the system as a sales promoter—none of these things; but that the fundamental question of policy is, Who shall control the consumer-market? And

[1] *Journal of Commerce*, May 10, 1915, p. 12.
[2] *Current Opinion*, LIII, 440-41.

this, too, adds weight to the conclusions from the issues of fact: that the premium system gives a powerful control over this consumer-market. Identified goods, national advertising, maintained price, manufacturers' coupons, market control, are all bound together in this issue of policy.

In the theoretical issues (con, 3, 14, 16, 19, 20; pro, 6, 10, 14) there is not much progress to be made. In following this lead the mind quickly reaches the bounds of academic casuistry. From the definition accepted here, that a premium is "something given besides that which is or is supposed to be the immediate incentive to the transaction of purchase and sale, something of value given other than it," the decision is already made in favor of the claim that "every merchant gives premiums in some form or other," and that some value besides that of the actual merchandise is given.

Whether premium-giving is a form of advertising or not it is impossible to say, since the advertising experts are not yet agreed among themselves upon a proper definition.[1] Both sides agree, however, that, whether successful or not, it is a method that aims to increase sales. It will remain for the legal mind to draw out the finer thread of distinction.

The theorists who condemn premium-giving as a "social waste" must needs condemn along with it many other methods used by merchants and manufacturers to push the sale of their goods. In this respect, the formal theorists reach the point where both sides in the controversy are alike condemned, and hence pass beyond the limits of this discussion.

III

What now is the legal status of the premium-giving system? The hostility toward it, that has continued so relentlessly for so long, has time and again found voice in legislative halls, and laws, more or less drastic in character, have been passed in twenty-six states and in Hawaii and the District of Columbia, either prohibiting the system outright or imposing a heavy license tax upon premium companies and the merchants and manufacturers using the coupon system. "Between 1888 and 1915, statutes prohibiting, restricting, or licensing on the payment of fees the use of trading stamps were passed by Alabama, Arkansas, California, Colorado, Florida, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, Indiana, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia."[2] As early as 1873 Congress passed an act making it a penal offense to engage in any "gift enterprise" in the

[1] Cf. *Printer's Ink*, April 29, 1915, pp. 63-68.
[2] *Tanner* v. *Little*, 240 U.S. 375.

District of Columbia, and defined a "gift enterprise" so as to include specifically the trading stamp and coupon system.[1] From that time on laws have been written and rewritten on the statute books of the various states. The promoters of this kind of legislation, not discouraged by a court decision declaring one law unconstitutional, would quickly have another passed in an amended form. The premium companies, against whom many of the laws appear to be aimed (cf. the law of Minnesota) have generally relied upon the courts to annul the statutes, although in certain cases they have threatened to invoke the Sherman Anti-Trust law, where chambers of commerce or merchants' associations have sought for a merchants' agreement to discard the system.[2]

These laws are naturally very similar in general character, although differing in details and penalties.[3] The main provisions are: (1) a straight prohibition of, or a license tax (from $200 to $6,000) upon, the use of trading stamps, coupons, certificates, or other similar devices; (2) a provision that such stamps, etc., "should have legibly printed or written upon their face their redeemable value in lawful money"[1] and (3) that such stamps, etc., should be redeemable in "goods, etc., or in cash, good lawful money of the United States at the option of the holder thereof."[2]

There might be either one or two purposes in mind in the passing of laws taxing the use of trading stamps, coupons, etc.; (1) such measures might be passed to secure revenue for the state, or (2) their aim might be to abolish the system. A survey of the existing laws convinces one that the Supreme Court of Nebraska was correct in saying, "A reading of them [the laws] will show that, while their real purpose is attempted to be concealed in the language used, it is apparent that such real purpose is to abolish the trading-stamp system of advertising by retail merchants."[3] These laws only voice the same fell purpose to destroy the premium-giving system root and branch that is found behind the arguments summarized above.

The passage of these laws brought the whole question into court for decision. There the issues were

[1] *Ibid.*, p. 375.

[2] *Journal of Commerce*, April 29, May 5, 10, 1915.

[3] Florida Law of 1913, chap. 6421, No. 1, S. 35: "Merchants, Druggists, and Storekeepers, shall pay a license tax as follows: . . . . Provided further, that each and every person, firm, or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a state license tax of five hundred ($500.00) dollars, and a county license tax of two hundred fifty ($250.00) dollars, in each and every county in which said business is conducted or carried on, and if more than one place of such business shall be operated by any person, firm, or corporation, a separate state, and county license shall be taken out for each such place: and no person, firm, or corporation shall offer with merchandise, bargained or sold as aforesaid, any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation who may redeem the same. The license prescribed in this section shall be in addition to other licenses prescribed by this act. Any person violating any of the provisions of this section, whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand ($1,000) dollars, or by imprisonment in the county jail not exceeding six months" (p. 35).

Washington law of 1913, chap. 134, S. 1, pp. 413-14: "1. Every person, firm, or corporation who shall use, and every person, firm, or corporation who shall furnish to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving same with such sale of goods, wares, or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge, or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing, selling, or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm, or corporation from which such furnishing, selling or in which such using, shall take place.

"2. In order to obtain such license the person, firm, or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall, upon the presentation thereof, issue to the person, firm, or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 1 of the act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

"3. No person, firm, or corporation shall furnish or sell to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares, or merchandise any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city, or county in this state other than that in which such furnishing or selling shall take place.

"4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

Indiana law of 1913, chap. 129*A*, Trading Stamps: "10463*a*. Trading Stamps, contents, money value: 1. That no person shall sell or issue any stamps, trading stamps, cash discount stamps, check, ticket, coupon, or other similar device which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive either directly from the vendor or indirectly through any other person, money or goods, wares or merchandise, unless each of said stamps, trading stamps, cash discount stamps, checks, tickets, coupons, or other similar devices shall have legally printed or written on the face thereof the redeemable value thereof in lawful money of the United States.

"10463*b*. Redemption in money: 2. Any person who shall sell or issue to any person engaged in any trade, business, or profession any stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device which will entitle the holder thereof, on presentation thereof, either singly or in definite number, to receive either directly from the vendor or indirectly through any other person money, goods, wares, or merchandise, shall upon presentation redeem the same either in goods, wares, or merchandise, or in lawful money of the United States, at the option of the holder thereof, at the value in lawful money printed on the face thereof: *Provided*, that the same be presented for redemption in number or quantity aggregating in money value not less than five (5) cents in each lot.

"10463*c*. 3. Refusal to redeem brings liability for full cash value.

"10463*d*. 4. The redeemable value of such stamp, trading stamp, cash discount stamp, check, ticket, coupon, or other similar device, printed or legibly written on the face of said stamp as herein provided, shall be the same whether redeemed in merchandise or in lawful money of the United States, and the redemption of such stamps as herein above mentioned shall be in lawful money of the United States or in merchandise of equal value thereto at the option of the holder of said stamps.

"10463*e*. 5. Consent of original issuer to use is required.

"10463*f*. 6. Penalty not less than fifty dollars, nor more than one hundred dollars."

[1] Cf. New York laws of 1904, chap. 576, sec. 1; Washington laws of 1907, p. 742, sec. 1, etc.

[2] Washington laws of 1907, p. 742, sec. 2.

[3] *State* v. *Sperry & Hutchinson*, 94 Neb. 785.

quickly drawn, for the defenders of the system complained that their constitutional rights were interfered with. The Fifth and Fourteenth amendments to the United States Constitution, or like provisions in state constitutions, were invoked in their behalf. "In this and other like cases in the state courts the decisions rest either upon section 1 of the Fourteenth Amendment, to the Constitution of the United States, which provides that no state shall 'deprive any person of life, liberty, or property without due process of law,' or upon provisions of the state constitutions which contain similar language. . . . . The Fifth Amendment to the Constitution of the United States contains such a prohibition, which is binding upon the United States.[1] In general, the arguments were concentrated upon two main legal points: (*a*) Is the premium-giving system of such a character as to bring it within the police power of the state? That is, does it threaten the public peace, health, morals, or general welfare? (*b*) Is the special burden imposed by the tax laws, and is the prohibition, discriminatory? That is, can the giving of tokens be singled out from the various forms of advertising and selling as sufficiently unique for special legislation?

Upon these issues there developed two sets of cases, one running back to the reasoning found in *People* v. *Gillson*[2] and the other springing from the reasoning of *Lansburgh* v. *District of Columbia*.[3] In the former case, the defendant sold two pounds of coffee and "did deliver as a gift, etc., a tea cup and saucer to the purchaser" (p. 396). Judge Peckham, who wrote the decision, based his argument upon the following definition of business liberty: "Liberty means the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation" (p. 399). These, he said, are constitutional rights. In applying them to the case in hand he concluded: "It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. It is evidently of that kind which is meant to protect some class in the community against the fair, free, and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing, or producing fields" (p. 399). He compared such a law in character with the old English acts which declared, in the name of public thrift,

[1] *Lansburgh* v. *District of Columbia*, 11 App. Cases D.C. 519.
[2] 109 N.Y. 389.
[3] 11 App. Cases D.C. 512.

"that no man or woman under the rank specified in the law should thereafter wear fur on his or her clothing, or that no knight under the degree of lord should wear shoes or boots having pikes in them more than two inches long" (pp. 404-5).

This case was followed in *State* v. *Dalton*[1] and *People* v. *Dycker*,[2] where the law was aimed at "the third party to the sales contract"—the premium companies. The judge declared the law unconstitutional because rights were "invaded, weakened, limited, or destroyed," and because the law was discriminatory. "Premium-giving," he says, "is simply one of the infinite varieties of devices which are resorted to by tradespeople, in these days of sharp competition, to promote the sale of their goods" (p. 236). And he cited, for an analogy, *City of Chicago* v. *Netcher*,[3] that held invalid a city ordinance to prevent the exposing for sale or selling of fish in a store where dry goods were sold.

In *Young* v. *Commonwealth*[4] and *State* v. *Shugart*,[5] which also followed *People* v. *Gillson*, it is declared to "have universally been held under these statutes that the scheme of issuing and redeeming trading stamps was not a lottery or gambling device."[6]

The leading case which presents a different view is *Lansburgh* v. *District of Columbia*.[7] Here, it must be remembered, the decision was made under the act of February 17, 1873, entitled "An act prohibiting gift enterprises in the District of Columbia," which specifically defined "gift enterprises" so as to include all trading stamps, coupons, and other tokens. The question was clearly one of public policy, and the judge was plain-spoken in his opinion:

"The Washington Stamp Co. and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device [p. 531]. With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate successfully, they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing

[1] 46 Atl. Rep. 234.
[2] 76 N.Y. Suppl. 111.
[3] Ill. Suppl. 55 N.E. 707.
[4] 101 Va. 853.
[5] 138 Ala. 86.
[6] 138 Ala. 122. Other cases following the *Gillson* v. *Dalton* reasoning are: *Ex parte Drexel*, 147 Cal. 763; *Commonwealth* v. *Sisson*, 178 Mass. 578; *State* v. *Sperry & Hutchinson Co.*, 126 Northwestern 120.
[7] 11 App. Cases D.C. 512.

their stamps upon a perhaps unwilling merchant who pays them in cash at the rate of $5 per thousand. The merchant who yields to their persuation does so partly in the hope of obtaining the customer of another, and partly through fear of losing his own if he declines. Again, a limited number only (an apparently necessary feature of the scheme) are included in the list for the distribution of stamps, and other merchants and dealers who cannot enter must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency [p. 531]. . . . .

There is not a shadow of rational foundation for the stamp company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued and its contracts faithfully performed, its inevitable result would be, as in all unnecessary intervention of third persons, or "middlemen," between producer and consumer, an increase of cost to the latter [p. 532]."

These scathing words are offered gratuitously, since there is no need to analyze the system, the law by its very wording applying specifically to it.

A $1,000 license-tax law was sustained in Arkansas[1] by legal reasoning based on the Lansburgh case. "Manifestly," says Judge Rogers, "the legislature of the state regarded this gift enterprise as detrimental to the community. I do myself. I do not regard it as a legitimate business" (p. 863). Premium companies were denominated as gift enterprises, as in the District of Columbia. *Fleetwood* v. *Read*[2] sustained a Tacoma license-tax ordinance, but in 1907 the Supreme Court of the state held invalid the 1905 trading-stamp law. It said that the Lansburgh and Fort Smith cases had not been able "to stem the trend of opposing opinion." *Hawkins* v. *State*[3] sustained a license-tax law as being a legitimate use of police power. "If the stamp," says the judge, "entitles the holder to something which is uncertain and unknown at the time of the purchase, it matters not whether the vendor of the goods, wares, or merchandise, or some other person, redeem it. It is then so far of the nature of a lottery, or gambling transaction, as to bring it within the power of the legislature to prohibit it" (p. 147).

On the issue of discrimination, the court in *Sperry & Hutchinson Co.* v. *Melton*[4] declares that

"trading-stamp merchants, if such they may be called, or trading-stamp dealers and redeemers, surely stand in a novel and distinct class by themselves. They do a business that is quite different from storekeepers who sell for cash or credit, and deal in goods after the ordinary methods. . . . . If these trading-stamp dealers are advertising agents as claimed by the plaintiff, they indeed stand in a distinct class as such. . . . . They do not at all operate as advertising agents usually do, and are distinguishable from the ordinary class of that line as a class by themselves. Advertising agents do not ordinarily issue orders for merchandise and keep on hand merchandise for the redemption of those orders. The very description which the plaintiff gives of its business satisfies any mind that it is in a class by itself —that there is none other like it. The rule for reasonable classification has been fulfilled by the act of fixing the tax in question" [p. 21].[1]

To strengthen the minority rulings sustaining the anti-premium state laws came the decision of Commissioner Osborne of the Internal Revenue Department that "the packing of coupons in packages sent into all states must conform with the regulations of each state which enforces laws against this form of premium-giving."[2]

This was the situation in March, 1916. A clear, if not overwhelming, majority of cases held with *People* v. *Gillson* that the state laws prohibiting or taxing the use of premiums were invalid. But the minority tried to make up for weight of opinion by vigor of denunciation. Outside of the courts both parties were active; the premium companies to advance their business, their opponents to secure further legislation. It was then that the voice of the highest legal tribunal in the land spoke in the three cases cited at the beginning of this paper. *Rast* v. *Van Deman* contains the full argument upon which all three decisions depend, and thus they are bound together indissolubly.

The main points that came up for decision are well summarized in the brief for defense given in *Tanner* v. *Little* (*cit. sup.*, pp. 377-78).

BRIEF FOR DEFENSE

1. The act is prohibitive.
2. To prohibit conduct of the business is contrary to the law of the land.
3. The prohibition does not fall within the police power because the system tends to limit extravagance.
4. The act is not brought within the police power because it is lawful to foster intermediate concerns.
5. The act denies equal protection of the law because the attempted classification for the purpose of a license tax is purely arbitrary.

[1] *Humes* v. *City of Fort Smith*, 93 Fed. 857.
[2] 21 Wash. 547.
[3] 95 Md. 133.
[4] 71 Southeastern Rep. 19.

[1] Cases holding that premium-giving is advertising: *Ex parte McKenna*, 126 Cal. 429; *State* v. *Shugart*, 138 Ala. 86; *Columbia* v. *Lusk*, Richmond Co. Common Pleas Court, September 30, 1909; *State* v. *Sperry & Hutchinson Co.*, 110 Minn. 378; *Hewin* v. *Altanta*, 21 Ga. 731; *Little* v. *Tanner*, 240 U.S. 369.
[2] Cf. *Journal of Commerce*, May 4, 1916, p. 11.

6. The practice of using premium stamps is legitimate as a method of advertising. The coupon system furnishes a peculiar and legitimate inducement for the return of a customer.

7. If the business or practice is lawful, it may not be prohibited indirectly by a license tax.

8. The further point in *Rast* v. *Van Deman* is that the premium business is interstate business and therefore beyond the jurisdiction of the state legislature.

The court began its analysis with a discussion of the question of arbitrary classification or discrimination. Justice McKenna, who wrote the decision, answered it by saying:

"The ground of discrimination simply, and separated from the other attacks upon the statute, does not present much difficulty. The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed."[1]

Such reasoning is not very discriminating, to say the least, and seems to be extremely like an evasion. To the layman, who is interested in the economic principles involved, it is most disappointing, for the whole point is gone unless there is to be a commercial analysis. If the premium-giving system can thus be segregated, it follows that there is no discrimination when it is licensed to death or prohibited. Furthermore, if this method of securing trade is so superficially classified, why not other agencies, such as advertising agencies, employment bureaus—all functional middlemen, indeed? The District Court had said with a better show of reason: "As well might the legislature classify separately those who advertise in the columns of the daily papers, by billboards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling who do not so advertise."[2]

With this point of discrimination settled, there remained but one further step to be taken in order to establish the right of the legislatures to enact what laws they will in regard to the premium system. The further step was to show that the principle upon which the classification was made was of such character as to bear upon public health, safety, or morals. "It is unimportant what the incidents may

[1] *Rast* v. *Van Deman, cit. sup.*, p. 357.
[2] *Tanner* v. *Little*, 240 U.S. 381.

be called, whether a method of advertising, discount giving, or profit-sharing. Their significance is not in their designations but in their influence upon public welfare."[1] "The police power is not subject to any definite limitations, but is co-extensive with the necessities of the case and the safeguard of the public interests."[2]

In order to reach a conclusion here it was necessary for the court to take a stand as to the character of the premium-giving system. This is the crux of the whole decision; beyond all cavil it is a serious matter when the Supreme Court of the United States speaks in condemnation of a business method.

Not only, then, is the system of premium-giving to secure trade different from all other methods, but it is different in such a way as to affect public welfare. The significant passages in the decisions bearing upon this point follow:

"No refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of an article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is mere identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success. The schemes of the complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of value greater than the article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. . . . . This may not be called in an exact sense a "lottery," may not be called "gaming"; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make. . . . .[3]

And it can be urged that the reasoning upon which they [arguments for "inviolable rights" as legitimate advertising] are based regards the mere mechanism of the schemes alone and does not give enough force to their influence upon conduct and habit, not enough

[1] *Tanner* v. *Little*, 240 U.S. 385.
[2] Justice Brown in *Canfield* v. *U.S.*, 167 U.S. 510, 524.
[3] *Rast* v. *Van Deman*, p. 365.

to their insidious potentialities, to which not courts but legislatures may be the best judges, and, it may be, the conclusive judges. . . . .[1]

It appears that companies are formed, called trading-stamp companies, which extend and facilitate the schemes, making a seller of merchandise their agent for the distribution of stamps to be redeemed by them or other merchants, the profit of all being secured through the retail purchaser who has been brought under the attraction of the system. There must, therefore, be something more in it than the giving of discounts, something more than the mere laudation of wares. If companies evolved from the system, as counsel say, in justification of them, are able to reap a profit from it, it may well be thought there is something in it which is masked from the common eye and that the purchaser at retail is made to believe that he can get more out of the fund than he has put into it, something of value which is not offset in the price or quality of the articles which he buys. It is certain that the prices he pays make the efficiency of the system and the fund, if we may individualize it, out of which the cost of the instruments and agents of the system must be defrayed and the profit to all concerned paid. The system, therefore, has features different from the ordinary transactions of trade which have their impulse, as we have said, in immediate and definite desires having definite and measurable results. There may be in them at times reckless buying, but it is not provoked or systematized by the seller.[2]

This unanimity of the legislative mind refutes the argument that the use of trading stamps is only a legitimate and harmless system of advertising.[3]

All of the schemes have their influence and effect within the state. The transactions, therefore, are not in interstate commerce."[4]

Thus is the premium-giving system condemned. Premiums are not merely advertising; "they tempt by a promise of a value greater than the article and apparently not represented in its price"; they may be considered as "having the seduction and evil" of lotteries and gaming; they have "insidious potentialities"; "by an appeal to cupidity they lure to improvidence." The system has "something in it which is masked from the common eye"; the purchaser at retail is made to believe that he can get more out of it than he has put into it, something of value not offset in the prices or quality of the articles which he buys; and in the end the cost of the instruments and agents of the system must be defrayed and the profit to all concerned paid—by the consumer. And

[1] *Ibid.*, p. 364.
[2] *Tanner* v. *Little, cit. sup.*, p. 385.
[3] *Ibid.*, p. 376.
[4] *Rast* v. *Van Deman, cit. sup.*, p. 360.

because of these qualities, the system affects public welfare and hence lies within the legislative power to control, to tax, to prohibit.[1]

It will be noted, in the first place, that the principle is established from the point of view of the ultimate consumer; the "deleterious" effects upon him are of prime importance. The relation of dealer to dealer, of merchant to manufacturer, of premium user to premium issuer and redeemer, does not enter. As a method of promoting sales it is not condemned as unfair competition, but only as having undue power of "seduction" upon the consumer.

This undue seductive power, it will be further noted, lies in the offer of "something else than the article sold." The transaction of purchase and sale is then no longer "simple, single in purpose and motive." The buyer seemingly gets more than he pays for. This is the appeal to cupidity that lures to improvidence. This is contrary to public welfare. Upon this pivot turns the whole question.

Obviously, whether this assertion is true or false is a question of fact. But the court has not found it within its province to make the investigation in order to know the facts. This matter of inquiry and of judgment is "finally within the power of the legislature to make." And "this unanimity of the legislative mind refutes the argument that the use of trading stamps is only a legitimate and harmless system of advertising." Nowhere is it clearly pointed out that the "evil" effects of this system are to be distinguished from those of a score of other sales-promoting plans. There is the selling on the instalment plan, the "fire sales," slack-season sales, and most of all the liberal giving of credit. It demands demonstration that premium-giving is more of a lure to improvidence than liberal credit giving. These are questions that seem fundamental to the meting out of fairness and justice. If the mere external features are not to be used as a basis of classification and discrimination, the more subtle effects must be sought. And when these effects are analyzed fully, the whole realm of modern consumer appeal will be under survey. The same individuals, the same forces, the same motives, and at least similar results, are in them all. The money expended by merchants and manufacturers upon the premium system is only a small part of the billion dollars, more or less, invested annually in sales-promoting schemes. This vast sum is designed to be used in the most effective way to appeal to the consumer. That premium-giving can be made effective there is good evidence. Is it possible that it is too effective?

Another point in the decision that is of considerable interest is the court's definition of advertising.

[1] Whether a system covering several states does an interstate business is merely incidental. The question of abrogated contracts does not enter here.

"Advertising is mere identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The cloth is cut too short for a fit in this garment. There is no place for the educational advertising campaign, the development of new wants; there is no place for the advertisement whose purpose is to sell a *certain make of goods* where there are a half dozen choices of equal quality at the same place. Would the legal advertisement say a high-class automobile may be bought at 23 North High Street—and no more? Has the learned judge never delved into the new business of advertising? Does he not know of the eager study of methods of appeal, of the principles of psychology, of art, of color effects, of design, of the power of words? Has he never seen any appeal to cupidity, any "insidious potentialities," any "lure to improvidence," any seductive power on wall and tree, in street car, and on magazine and newspaper page? Is there no insidious seduction, no lure in legalized "puffing" of one's goods? There may be, he admits, in other forms of sale promotion "at times reckless buying, but it is not provoked or systematized by the seller."[1] Not provoked or systematized at the rate of nearly one billion dollars per year! After all, approach the question as one will, is not the source of all opposition the plain and simple fact that the premium-giving system is too successful?

IV

The importance of these decisions justifies a concluding summary. So far the endeavor has been to present as much first-hand material as possible, only summing up the points and making deductions for the sake of clearness and convenience. It is believed that in every case the reader can check up, from the material given, all generalizations. The honest aim has been to approach the subject in as cool and dispassionate a manner as possible. It may well be that by coming in contact with so much biased argument the writer's judgment is unconsciously warped: undoubtedly it is true that many facets of the complex problem have escaped him. His hope is that the raw material collected here may aid in further analysis.

1. First, then, it seems beyond doubt that the premium-giving system has never been able to outgrow the stigma of its early connection with lotteries and gambling schemes. The "something for nothing" bogey rose from this connection, and no amount of emphasis upon its profit-sharing and advertising features can "down" this Banquo's ghost. As the premium business is carried on to-day, it does not deserve this association.

[1] *Tanner* v. *Little, cit. sup.*, pp. 384-85.

2. That the system can be carried on "right out in the open," where nothing is "masked from the common eye," is readily demonstrable; that it is so carried on is, as has been said, a question of fact and not to be answered without further inquiry. For the premium companies there is, for a profit, the difference between the wholesale and retail price of the goods offered as premiums plus the money received for the tokens that are never used.[1] For the merchants and manufacturers using the tokens there is the increase in patronage. As has been pointed out, there is abundant evidence of the great drawing power of premiums. The premium companies have flourished: their patrons have continued to use the premium system. This is further evidence of the commercial soundness of it.

3. It does not seem fair for a court of justice to assert without proof that the premium companies "prey upon both the dealer and the consumer," that they are "commercial parasites." If they afford a successful means of sales promotion, there is no apparent reason why, under a system of free competition, they should be singled out, on the basis of merely external differences, from a list of specialized industries for scathing denunciation. The laborer may be worthy of his hire. The ultimate consumer is left defenseless against so many other onslaughts that this special protection is uncalled for. On the other hand, from this beginning may not the social control of business methods extend without limits? The line of demarkation between methods of increasing sales is shadowy; the Rubicon has already been crossed.[2]

4. Furthermore, it is held here that, in spite of the long-continued controversy in legislatures, in courts, among business men, all the issues have not been clearly isolated. There is a basis for inquiry in the fact that while the great retail associations have been carrying on a fight against the system, many honest and honorable merchants have sanctioned its use. There is the situation where the big store, with rising costs due to other forms of "service," other methods of sales promotion, decries the use of trading stamps of its smaller competitor. It provokes inquiry to find that newspapers and magazines, with advertising columns loosely censored, rail against the use of coupons in the name of the defenseless consumer. Is it because premium advertising cuts down space advertising? Or is the whole matter a question of fact, or a question of good, long-run business policy, or a question of sound economic theory?

a) The question of fact is to be answered by a

[1] Sperry & Hutchinson say they have redeemed 84 per cent., 1900-1915 (*Printer's Ink*, June 29, 1915, p. 151); United Cigar Stores Company, 86¾ per cent.; Sperry & Hutchinson, 1914, over 90 per cent.

[2] A movement is now on foot to cure the "returned goods evil" by the passage of laws in all states prohibiting the practice.

thorough, unbiased inquiry. If there is wrongful dealing, if there is deliberate deception, if there is cheating, if there are inferior goods palmed off as high-grade goods, if there is an unwarranted increase of cost, it can be known through investigation. At least, it will be a long step beyond accusation and categorical denial.

b) The question of policy is answered by individual judgment, circumscribed only by public welfare. The business judgment is sound and the public welfare secure only when both are based upon known facts. The question of policy, then, can be answered only after the question of fact.

c) The orthodox economic theorists are but recently giving any place at all in their systems to methods of increasing trade. So far all methods have found only condemnation. When the theorists realize more fully the function of advertising and aggressive sales methods, there may come some help from this source.

5. There is also the important question of method. That the road to business reform leads through the legislature is not yet universally accepted. Other forms of social control, such as public sentiment, education, professional or business ethics, might prove more expedient and more efficacious—if there is need of reform. Bound up with the prohibition of premium-giving, therefore, is the profound question of the wisdom of taking this further stride toward paternalism in business.

6. The transcending issue is undoubtedly the social aspect of the question. All inquiry and all analysis should be centered here. But it should never be forgotten that premium-giving is "only one of an infinite number of devices which are resorted to by tradespeople in these days of sharp competition to promote the sale of their goods." The social aspect of the whole modern system of promoting sales is involved. When fair and just principles have been laid down it will then be time, and a relatively easy matter, to pass judgment upon any particular device. Until that time there can be little else than "muddling along."

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